Chuah Eng Khong v Malayan Banking Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-615 OF 1995
SITI NORMA YAAKOB, MAHADEV SHANKAR AND DENIS ONG JJCA
25 JUNE 1997

Civil Procedure *— Judgment — Merger of debts in judgment — Whether merger of the borrower's covenant to repay principal and interest in the judgment — Personal covenant for payment arising from a loan agreement — Whether personal covenant for payment was extinguished by judgment*

Civil Procedure *— Interest — Judgment debt — Whether the contractual rate of interest claimed by the plaintiff was only allowed up to date of judgment and only 8%pa was allowed thereafter on the decretal sum until realization — Whether the plaintiff was allowed to insist on being paid the excess post-judgment interest which had accrued due to the plaintiff at the contractual rate*

Land Law *— Lien — Retention of title deeds — Action for return of title deed upon payment of judgment sum — Exercise of court's discretion — Whether principal and judgment interest up to date of realization must be paid in full before court could order return of title deed*

On 27 July 1983, the appellant ('the borrower') signed a sale and purchase agreement with a housing developer who undertook to build a house on the lot purchased by the borrower ('the land'). The borrower subsequently took a loan with the respondent ('the bank') and a loan agreement cum assignment ('the loan agreement') was executed. Clause 5 of the loan agreement assigned the benefit of the sale and purchase agreement to the bank. The borrower defaulted in paying the monthly instalments and after several attempts of demand and recall by the bank, the borrower still did not comply.

In breach of the loan agreement which prohibited the borrower from dealing with the land without the consent of the bank, and unbeknown to the bank, the borrower entered into an agreement in writing on 3 June 1985, purporting to sell and transfer the land to one Tan Ah Tong ('Tan'). To protect his interest, Tan lodged a caveat ('the first caveat') on the land on 8 April 1986. Subsequently, on 3 June 1986, Tan assigned all his rights in the land to Chung Chok Kiang ('the borrower's sister').

On 3 October 1988, the bank obtained judgment for RM80,644.84 being the outstanding balance as at 12 November 1987. However, the contractual rate of interest claimed was only allowed up to date of judgment and only 8%pa was allowed thereafter on the decretal sum until realization.

The borrower's sister caveated the land on 12 March 1992 ('the second caveat'). On 2 November 1992, the bank applied for the removal of the second caveat as the first caveat had presumably lapsed. This was because when the title of the land came out, the bank was unable to register the borrower's memorandum of charge.

The bank contended that the borrower's sister had no registrable interest in all the circumstances. A

On 4 August 1994, the bank also filed a caveat on the land ('the third caveat') and on 15 August 1994, the bank's solicitors issued a bankruptcy notice claiming the full amount due to them by way of decretal sums interest up to 15 August 1994 and costs. The amount due came up to RM132,177.76. On 17 November 1994, the borrower tendered to the bank's solicitors the full amount claimed, ie RM132,177.76 upon terms that the bank accept the same in full satisfaction and release the said title to him. The bank refused and required payment of RM241,447.31 as at 2 December 1994. The difference in figures came about because the bank had calculated interest due after judgment at the contractual rate, whereas interest at the judgment rate was a fixed 8%pa on the decretal sum as from 3 October 1988. B C

The borrower filed an originating summons on 22 December 1994 praying for a declaration that RM132,177.76 represented the entire debt owing from him to the bank under the loan agreement and the judgment and that the title be returned to him upon receipt by the bank of RM132,177.76. The bank had insisted on being paid the excess post-judgment interest which had accrued due to the bank at the contractual rate. The trial judge found as a fact that the borower had not executed the charge and as the bank held the title deed as security, its caveat was a lienholder's caveat. Further, the trial judge held that there was no merger of the borrower's covenant to repay principal and interest in the judgment but that the terms of the loan agreement imposed an independent covenant to pay interest at the contractual rate up to date of repayment. Therefore, the trial judge dismissed the borrower's application. The borrrower appealed. On 31 January 1997, the second caveat was successfully removed. D E F

Held, allowing the appeal with costs:

(1) In the case of charges under the National Land Code 1965, the legal estate remains in the borrower. The term 'security' means the instrument upon which the lender relies to enforce his claim. Thus, the loan agreement would be a security and the memorandum of charge executed by the borrower was another security. G

However, in this case, the bank's action in the sessions court was on the loan agreement alone, and therefore against the borrower personally. The personal covenant for payment of principal and interest arising from the loan agreement was extinguished by the judgment (see pp 185I and 186A–B). H

(2) The bankruptcy notice was predicated solely upon the judgment. The trial judge should have treated the matter before him as one that concerned the validity of the bankruptcy notice only and could have directed it be set aside upon payment of the sum I

stipulated therein. To that extent, this appeal was allowed because the consequence of non-payment was that the bank would have been entitled to present a bankruptcy petition (see p 186C).

(3) The allowing of the appeal should not be understood to mean that the bank was under any obligation to return the title until the parallel obligation to satisfy the charge has been fulfilled by the borrower. The bank's rights to register the charge now that the second caveat has been removed has not been tested. In such circumstances, it would be wrong to order the bank to return the title as prayed for by the borrower. His hands were very soiled, and specific relief was very much a discretionary remedy. If the borrower wanted to discharge the judgment now, he must pay principal and judgment interest up to date of realization (see pp 186D, I and 187B).

[Bahasa Malaysia summary

Pada 27 Julai 1983, perayu ('peminjam') menandatangani perjanjian jual beli dengan pemaju perumahan yang mengakujanji untuk membina sebuah rumah di atas lot yang dibeli oleh peminjam ('tanah tersebut'). Peminjam kemudiannya mengambil pinjaman dengan penentang ('bank tersebut') dan perjanjian pinjaman yang juga perjanjian serahhak ('perjanjian pinjaman tersebut') dilaksanakan. Fasal 5 perjanjian pinjaman tersebut menyerahhak faedah perjanjian jual beli itu kepada bank tersebut. Peminjam ingkar dalam pembayaran ansuran bulanan dan selepas beberapa cubaan tuntutan dan panggilan balik oleh bank, peminjam masih tidak mematuhinya.

Dengan melanggar perjanjian pinjaman tersebut yang menghalang peminjam daripada berurusan dengan tanah tersebut tanpa kebenaran bank tersebut, dan tanpa pengetahuan bank tersebut, peminjam mengikat perjanjian bertulis pada 3 Jun 1985, bertujuan untuk menjual dan memindahmilik tanah tersebut kepada seorang bernama Tan Ah Tong ('Tan'). Untuk menjaga kepentingannya, Tan memasukkan kaveat ('kaveat pertama') ke atas tanah tersebut pada 8 April 1986. Kemudiannya, pada 3 Jun 1986, Tan menyerahhak kesemua haknya dalam tanah tersebut kepada Chung Chok Kiang ('adik peminjam').

Pada 3 Oktober 1988, bank tersebut memperolehi penghakiman sebanyak RM80,644.84 yang merupakan baki yang belum dijelaskan pada 12 November 1987. Bagaimana pun, kadar faedah kontraktual yang dituntut hanya dibenarkan setakat tarikh penghakiman dan hanya 8% setahun dibenarkan selepas itu atas jumlah wang dekri sehingga realisasi.

Adik peminjam memasukkan kaveat ke atas tanah tersebut pada 12 Mac 1992 ('kaveat kedua'). Pada 2 November 1992, bank tersebut memohon untuk membatalkan kaveat kedua kerana kaveat pertama telah dianggap luput. Ini adalah kerana apabila hakmilik kepada tanah tersebut dikeluarkan, bank tersebut tidak dapat mendaftarkan

memorandum gadaian peminjam. Bank tersebut menghujahkan bahawa adik peminjam tidak mempunyai kepentingan yang boleh didaftarkan dalam semua keadaan. A

Pada 4 Ogos 1994, bank tersebut juga telah memasukkan kaveat ke atas tanah tersebut ('kaveat ketiga') dan pada 15 Ogos 1994, peguamcara bank tersebut mengeluarkan notis kebankrapan menuntut jumlah penuh yang perlu dibayar kepada mereka dengan cara faedah jumlah wang dekri sehingga 15 Ogos 1994 dan kos. Jumlah terhutang adalah sebanyak RM132,177.76. Pada 17 November 1994, peminjam menyerahkan kepada peguamcara bank tersebut jumlah penuh yang dituntut, iaitu RM132,177.76 atas terma bahawa bank tersebut menerimanya sebagai penyelesaian penuh dan melepaskan hakmilik tersebut kepadanya. Bank tersebut menolak dan menghendaki bayaran RM241,447.31 pada 2 Disember 1994. Perbezaan dalam angka timbul kerana bank tersebut telah mengira faedah yang perlu dibayar selepas penghakiman pada kadar kontraktual, manakala faedah pada kadar penghakiman adalah tetap pada 8% setahun atas jumlah wang dekri daripada 3 Oktober 1988. B C D

Peminjam memfailkan saman pemula pada 22 Disember 1994 menuntut satu deklarasi bahawa RM132,177.76 merupakan hutang keseluruhan yang terhutang olehnya kepada bank tersebut di bawah perjanjian pinjaman tersebut dan penghakiman dan bahawa hakmilik dikembalikan kepadanya setelah bank menerima RM132,177.76. Bank tersebut telah menuntut untuk dibayar faedah lebihan selepas penghakiman yang terakru yang perlu dibayar kepada bank tersebut pada kadar kontraktual. Hakim perbicaraan mendapati sebagai suatu fakta bahawa peminjam telah tidak melaksanakan gadaian itu dan oleh kerana bank tersebut memegang hakmilik itu sebagai cagaran, kaveatnya adalah kaveat pemegang lien. Selanjutnya, hakim perbicaraan memutuskan bahawa tidak terdapat percantuman waad peminjam untuk membayar balik jumlah wang pokok dan faedah dalam penghakiman itu tetapi bahawa terma-terma perjanjian pinjaman tersebut mengenakan waad yang bebas untuk membayar faedah pada kadar kontraktual sehingga tarikh pembayaran balik. Oleh itu, hakim perbicaraan menolak permohonan peminjam. Peminjam membuat rayuan. Pada 31 Januari 1997, kaveat kedua telah dibatalkan. E F G

Diputuskan, membenarkan rayuan dengan kos: H

(1) Dalam kes gadaian di bawah Kanun Tanah Negara 1965, estet undang-undang masih ada pada peminjam. Terma 'cagaran' bermakna suratcara yang digunakan oleh pemberi pinjaman untuk menguatkuasakan tuntutannya. Oleh itu, perjanjian pinjaman tersebut adalah suatu cagaran dan memorandum gadaian yang dilaksanakan oleh peminjam adalah cagaran yang lain. I

Bagaimana pun, dalam kes ini, tindakan bank tersebut di mahkamah sesyen adalah ke atas pinjaman perjanjian sahaja, dan oleh itu terhadap peminjam secara peribadi. Waad peribadi untuk

bayaran jumlah wang pokok dan faedah yang timbul daripada perjanjian pinjaman tersebut telah dipadamkan oleh penghakiman itu (lihat ms 185I dan 186A–B).

(2) Notis kebankrapan itu telah didasarkan semata-mata kepada penghakiman itu. Hakim perbicaraan sepatutnya menganggap perkara di hadapannya sebagai suatu yang berkaitan dengan kesahan notis kebankrapan sahaja dan sepatutnya telah mengarahkannya diketepikan atas bayaran jumlah seperti yang ditetapkan di dalamnya. Setakat itu, rayuan ini adalah dibenarkan kerana akibat tidak membuat bayaran adalah bank tersebut berhak untuk mengemukakan petisyen kebankrapan (lihat ms 186C).

(3) Membenarkan rayuan ini tidak sepatutnya difahamkan sebagai bermakna bahawa bank tersebut adalah di bawah apa-apa obligasi untuk mengembalikan hakmilik itu sehingga obligasi yang sama untuk menyempurnakan gadaian telah dipenuhi oleh peminjam. Hak bank tersebut untuk mendaftarkan gadaian oleh kerana kaveat kedua telah dibatalkan tidak diuji. Dalam keadaan-keadaan sedemikian, adalah salah untuk memerintahkan bank tersebut untuk mengembalikan hakmilik seperti yang dituntut oleh peminjam. Beliau tidak ikhlas, dan relief spesifik adalah remedi yang berasaskan budi bicara. Jika peminjam mahu melepaskan penghakiman itu sekarang, beliau mesti membayar faedah wang pokok dan penghakiman sehingga tarikh realisasi (lihat ms 186D, I dan 187B).]

Notes

For cases on judgment, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1824–2030.

For cases regarding interest on judgment debt, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1750–1759.

For cases on lien, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1997–2016.

Case referred to

Sim Lim Finance Ltd v Pelandok Enterprise Pte Ltd & Anor [1981] 1 MLJ 280 (refd)

Legislation referred to

National Land Code 1965

Appeal from: Originating Summons No S1–24–1016 of 1994 (High Court, Kuala Lumpur)

Malik Imtiaz Sarwar and *Karina Yong* (*Vazeer, Akbar, Majid & Co*) for the appellant.

Chin Ling Hau (*Ho, Loke & Koh*) for the respondent.

Cur Adv Vult A

Mahadev Shankar JCA (delivering the judgment of the court): This is an appeal from the judgment of the High Court dismissing the appellant's application for a declaration that he was entitled to require the respondent ('the bank') to return the title deed to a house and land the appellant ('the borrower') had bought from a housing developer, upon payment of the full amount of a judgment, interest and costs which the bank had obtained on a loan agreement cum assignment ('the loan agreement'). The bank had insisted on being paid the excess post-judgment interest which had accrued due to the bank at the contractual rate. The trial judge held that there was no merger of the borrower's covenant to repay principal and interest in the judgment but that the terms of the loan agreement imposed an independent covenant to pay interest at the contractual rate up to the date of repayment. B C

The material terms of this loan executed on 26 March 1984 were as follows:

Clause 1 D

(i) To repay to the lender on demand the loan together with interest thereon at the rate of 12%pa ('the prescribed rate' which expression shall where the context so permits include any other rate or rates which the lender may from time to time stipulate in the manner hereinafter provided) AND until demand as aforesaid to repay to the lender the loan together with interest thereon at the prescribed rate by 120 equal monthly instalments of RM885 ... . E

(iii) On demand to pay all such other sum and moneys as are or may become payable by the borrower under this agreement and in particular (but without prejudice to the generality of the foregoing) all the costs charges, expenses and other sums and moneys mentioned in cl 30 below. F

Clause 5

For the consideration aforesaid, the borrower hereby assigns unto the lender all his rights title and interest in the said lot and the full and entire benefit of the said agreement by way of security for the loan hereby granted. G

PROVIDED ALWAYS that notwithstanding the assignment hereinbefore contained or any other provisions of this agreement, the borrower shall and hereby undertakes to continue to observe, perform and be bound by all whatsoever conditions convenants and stipulations on the part of the borrower expressed or contained in the said agreement.

Clause 8 H

In the event that the borrower (or where the borrower shall be more than one person, if any one of them) shall:

(1) make default in payment of any one or more of the monthly instalments or any interest thereon or other sums or moneys (whether principal or interest) herein agreed or covenanted by the borrower to be paid; ... I

then and in any of such cases, the loan and any interest thereon and all other sums of moneys (whether principal or interest) for the time being owing under this agreement shall immediately become payable by the borrower to the lender and the lender shall forthwith become entitled to recover the

same with interest thereon at the prescribed rate and to exercise the rights and powers upon default herein by this agreement and by law provided without any previous notice to or concurrence on the part of the borrower.

Clause 12

Upon issue of a separate document of title to the said lot by the government, the borrower shall at his own cost and expense and upon being so required to do by notice in writing from the lender, take a transfer of and execute a charge over the separate document of title to the said lot such charge to be in the lender's standard form (with such variations thereof as the lender may require) in favour of the lender to secure repayment to the lender of the balance of the loan then due and all other moneys together with interest thereon at the prescribed rate payable and owing by the borrower to the lender under and by virtue of this agreement at the date of the execution of the charge.

Clause 13

For the considerations aforesaid, the borrower hereby irrevocably appoints the manager of the lender for the time being in Kuala Lumpur the attorney of the borrower and in the borrower's name or in the name of the attorney or otherwise and on the borrower's behalf to deal with the said lot in any manner whatsoever and to enforce all rights and remedies under the said agreement and do all other things as fully and effectually as the borrower could do himself in connection therewith ... .

Clause 14

This agreement shall remain in force until and unless the transfer and charge referred to in cl 12 hereof is duly registered against the register title to the said land or the *whole of the moneys secured by the said lot together with interest thereon* and all the other moneys payable to the lender hereunder are paid in full whichever first happens. (Emphasis added.)

Clause 28

So long as any moneys shall be owing by the borrower to the lender and during the continuance of this agreement, the lender shall have the custody and possession of the borrower's copy of the said agreement and of all other whatsoever documents evidencing any title to or right in the said lot or any benefits or rights annexed appurtenant or relating thereto or in any way connected therewith.

The document of title ('the title') to the land was not yet in existence when the loan agreement was executed. The borrower had on 27 July 1983 signed a sale and purchase agreement with a housing developer, Sri Donglai Sdn Bhd who undertook to build a house on the lot purchased by the borrower. Clause 5 of the loan agreement set out above assigned the benefit of this sale and purchase agreement to the bank. The title was issued only on 19 November 1984 and subsequently came into the possession of the bank by virtue of cll 12 and 13 of the loan agreement.

The borrower defaulted in paying four monthly instalments. On 10 December 1985, the bank's solicitors issued a demand for the same stating that failure will result in 'court action for recovery of the entire sum plus interest and costs'. The borrower did not comply.

On 7 March 1986, a second letter followed. The bank's solicitors now demanded and recalled 'the entire loan sum of RM63,341.09 only plus interest and costs'. Again, the borrower did not comply.

In breach of the loan agreement which prohibited the borrower from dealing with the land without the consent of the bank, and unbeknown to the bank, the borrower entered into an agreement in writing on 3 June 1985, purporting to sell and transfer the land to one Tan Ah Tong. The borrower and his solicitor must have been aware that the entire interest in the land had already been assigned to the bank. It is therefore very problematic what interest, if any, could have passed from the borrower to this Tan Ah Tong. To protect his interest, Tan Ah Tong filed a caveat Presentation No 206/86 Jilid 27 Folio 106 ('the first caveat') on 8 April 1986. Furthermore, since the land was subject to an express condition that it could not be dealt with without the consent in writing of the State Executive Council, the efficacy of this purported sale is very suspect.

The mechanics whereby the bank's interests in the land were to be protected under the loan agreement cum assignment was for the borrower to send a registrable memorandum of transfer to the bank together with a memorandum of charge duly executed. The title deed, upon issue, went from the developer directly to the bank. In 1986, Messrs Michael Chen & Lee were the bank's solicitors. Lian & Co were the borrower's solicitors. On 27 January 1986, they wrote to the bank's solicitors as follows:

> 27 January 1986
>
> Surat: Kami MBB–37–37–83–C
> Tuan C/1875/83
>
> M/s Michael Chen & Lee,
> 8th Floor, Bangunan Bangkok Bank,
> 105, Jalan Bandar,
> KUALA LUMPUR.
>
> Dear Sir/s,
> Re: K118, Taman Cheras Indah Phase 2, Kuala Lumpur
> Purchaser: Chuah Eng Khong
>
> We refer to the above matter and return you herewith the duly executed Borang 16A and duly attested by our Mr Lian for further action.
>
> We shall forward you the duly executed memorandum of transfer as the same is now being forward to M/s Sri Donglai Sdn Bhd for their execution and return, to enable us to forward the same to the relevant stamp office for adjudication.
>
> Yours faithfully,
> sgd

The plain meaning of this letter is that the borrower had forwarded to the bank the charge duly executed and attested, and that the transfer from the developer to the borrower would also be forwarded in due course.

Instead, on 3 June 1986, Tan Ah Tong by a written 'assignment' purported to assign all his rights to one Chuah Chok Kiang who is the borrower's sister. This transaction was also not reported to the bank. Nor was Tan Ah Tong's caveat removed notwithstanding the cessation of any further claims by him to the property.

On 5 February 1987, Lian & Co wrote to the bank's solicitors as follows:

> 5 February 1987
>
> Surat: Kami C/1875/83
> Tuan MBB–37–83–C
>
> M/s Michael Chen & Lee,
> 8th Floor, Bangunan Bangkok Bank,
> 105, Jalan Bandar,
> 50000 KUALA LUMPUR.
>
> Dear Sirs,
>
> Re: K118, Taman Cheras Indah Phase 2, Kuala Lumpur
> Purchaser: Chuah Eng Khong
>
> We refer to the above matter and the telephone conversation with your Mr Chandra.
>
> We have not been able to trace the memorandum of transfer.
>
> We have requested Mr Chuah Eng Khong to call at our office to execute a fresh memorandum of transfer.
>
> Yours faithfully,
> sgd

Despite this, no transfer was ever forwarded to the bank. The land continued to be registered in the name of the developer.

In December 1987, the bank filed a writ in the Sessions Court, Kuala Lumpur. The material portions of the statement of claim read as follows:

> (3) The plaintiffs' claim against the defendant is for the sum of RM80,644.84 being monies payable by the defendant to the plaintiffs as at 12 November 1987 for monies lent by the plaintiffs to the defendant as bankers for the defendant at his request and for interest agreed to be paid upon money due from the defendant to the plaintiffs pursuant to a loan agreement dated 26 March 1984.
>
> PARTICULARS
>
> *Housing Loan*
>
> RM80,644.84 being the outstanding balance as at 12 November 1987 together with further interest thereon at the rate of 10%pa at yearly rests and penalty interest of 1% above the current rate on the arrears of instalments from 13 November 1987 until full settlement.

(4) Further, by way of security for the abovesaid loan, the defendant, by the said loan agreement dated 26 March 1984, assigned to the plaintiffs all its rights, title and interests in and to the property known as Plot 118, Block K, Taman Cheras Indah, Kuala Lumpur ('the property'). A

(5) The said loan agreement provides, inter alia, that in the event the defendant default in the payment of any of the said instalments or any interest thereon or any other sums or moneys due and owing to the plaintiffs: B

(a) the said housing loan and any interest thereon and all other sums or moneys due and owing becomes immediately payable to the plaintiffs ... .

(8) By reason of the aforesaid, the whole outstanding sum due under the said charge [*sic*] became immediately due and payable by the defendant to the plaintiffs. C

(9) On 30 November 1987, the plaintiffs through their solicitors issued another letter to the defendant recalling and demanding the payment of the full outstanding sum of RM480,644.84 as at 12 November 1987 and the delivery of vacant possession of the property. D

The prayers read:

AND THE PLAINTIFFS CLAIM:

(a) the sum of RM80,644.84;

(b) interest thereon at the rate of 10%pa at yearly rests and penalty interest of 1%pa above the prescribed rate on the arrears of instalments both calculating from 13 November 1987 until satisfaction; E

(c) vacant possession of the property; and

(d) costs of this action.

The judgment recovered on 3 October 1988 was literally an order in terms except that the contractual rate of interest claimed was only allowed up to the date of judgment. Only 8%pa was allowed thereafter on the decretal sum until realization. F

Quite why the bank or its solicitors did not timeously pursue the transfer or seek to register the charge is not clear. On 12 March 1992, the borrower's sister, Chuah Chok Kiang, filed a caveat ('the second caveat') against the land claiming that Tan Ah Tong had paid the borrower in full but that Tan Ah Tong had yet to transfer the land to her. Again, her solicitor was Albert SF Lian. G

By Originating Summons No 24–849 of 1992 filed on 2 November 1992 in the High Court at Shah Alam, the bank applied for the removal of the caveat (presumably the first caveat had lapsed.) According to the affidavit of the bank manager affirmed on 31 October 1992 when the title to the land came out, the bank was unable to register the borrower's memorandum of charge because of the second caveat. The bank contended that Chuah Chok Kiang had no registrable interest in all the circumstances. H I

Chuah Chok Kiang resisted the application. Her affidavit is not before us. In a letter dated 13 January 1994, the borrower sought to mitigate his conduct by claiming that he had been unemployed but was now prepared with his sister's assistance to settle the loan by instalments.

A This offer must have been rejected because on 25 January 1994, the bank's manager filed a further affidavit in reply in which it is stated that the purported assignments by the borrower to Tan Ah Tong and thereafter to Chuah Chok Kiong was a conspiracy to defraud the bank.

On 4 August 1994, the bank also filed a caveat on the land. On
B 15 August 1994, the bank's solicitors issued a bankruptcy notice claiming the full amount due to them by way of decretal sum, interest up to 15 August 1994 and costs. The amount due came to RM132,177.76 and the bankruptcy notice gave the breakdown of how interest was calculated as per judgment.

C On 17 November 1994, the borrower tendered through his new solicitors to the bank's solicitors the full amount claimed, ie RM132,177.76 upon terms that the bank accept the same in full satisfaction and release the said title to him. The bank refused. It required payment of RM241,447.31 as at 2 December 1994.

The borrower then filed his originating summons on 22 December
D 1994 in the High Court at Kuala Lumpur. The first prayer was for a declaration that RM132,177.76 represented the entire debt owing from the borrower to the bank under the loan agreement *and* the judgment. The second prayer was for the return of the title upon receipt by the bank of RM132,177.76. The borrower also prayed for costs and such other relief
E as may be just. There were now three concurrent proceedings pending, ie the caveat removal application in the High Court, Shah Alam; the bankruptcy proceedings in the High Court, Kuala Lumpur; and this originating summons which was supported by an affidavit of the borrower. An affidavit in opposition was filed by the bank's manager, claiming RM242,396.75 had to be paid in order to obtain the release of the title
F deed as at 31 December 1994.

The difference in figures came about because the bank had calculated interest due after judgment at the contractual rate, whereas interest at the judgment rate was a fixed 8% per annum on the decretal sum as from the 3 October 1988.

G Unfortunately, the borrower's originating summons was very imprecise as to the consequences he was seeking to establish. The summons was not brought under the heading assigned to the bankruptcy proceedings, ie D2–29–1832 of 1994. Nevertheless, this was referred to as being the subject matter of the application as well as the loan agreement. The
H summons and the affidavit in support have been very adroitly drafted so as to exclude all reference to the charge executed by the borrower and his other misconduct in regard to the purported assignments and caveats all of which must have been undertaken to frustrate the bank's lawful claims. The prayers are now set out in full:

I (a) bahawa pembayaran jumlah wang sebanyak RM132,177.76 dari plaintif kepada defendan, sepertimana yang dituntut oleh defendan menerusi Notis Kebankrapan Mahkamah Tinggi Kuala Lumpur No D2–29–1832–1994, adalah merupakan penjelasan dan penyelesaian penuh hutang plaintif kepada defendan di bawah perjanjian bertarikh 26 Mac

1984 dan penghakiman bertarikh 3 Oktober 1988 di antara kedua-dua pihak; A

(b) bahawa defendan memulangkan kembali dokumen hakmilik sementara bagi tanah yang dikenali sebagai Daftar HS Mukim Ampang, No HS (M) 14801, No PT 5533 Lot 023815 kepada plaintif apabila menerima wang sebanyak RM132,177.76 yang tersebut di atas, tanpa apa-apa sekatan atau hak ke atasnya; B

(c) kos permohonan ini ditanggung oleh defendan; dan

(d) lain-lain perintah yang dianggap perlu dan suaimanfaat oleh mahkamah yang arif.

A free translation would read as follows: C

(a) that full payment of RM132,177.76 by the plaintiff [the borrower] to the defendant [the bank] as claimed in the bankruptcy notice in the Kuala Lumpur High Court No D2–29–1832–94 must be deemed to be in full settlement and satisfaction of the debt of the plaintiff to the defendant under the agreement dated 26 March 1984 and the judgment dated 3 October 1988 between the two parties; D

(b) that the defendant return the temporary document of title known as Register HS Mukim Ampang, No HS (M) 14801, No PT 5533 Lot 023815 to the plaintiff upon receipt of the amount of RM132,177.76 mentioned above, without any restrictions or rights on it;

(c) cost of the application to be borne by the defendant; and E

(d) any other orders which are deemed fit by the learned court.

In his judgment, the learned trial judge found as a fact that the borrower had not executed the charge, when the uncontested evidence before him was that he had done so. He also said that the bank's application was to F remove both caveats when in fact it was to remove the second caveat only. This error however is immaterial. What is critical is that the application to remove the second caveat was made so that the charge could be registered. Since the bank held the title deed as security, its caveat (as shown in the photocopy of the title deed exhibited in the appeal record) is a lien-holder's caveat. G

In the penultimate paragraph of his judgment, the learned trial judge found that cl 14 of the loan agreement was an independent covenant and merger does not apply because the moneys secured by the land and the interest therein at 12%pa have not been paid in full 'and the transfer and charge remain to be registered'. H

In point of fact, para 6 of the bank manager's affidavit of 31 October 1992 only refers to the charge. There is no reference anywhere to any transfer executed by the borrower. Nor has such a transfer (if there is one) or the charge been exhibited in the affidavits.

We heard arguments in this appeal on 30 January 1997 and reserved I judgment. We gave judgment in this matter on 25 June 1997, when we allowed this appeal with costs. It does not appear to have occurred to either counsel to inform this court that on 31 January 1997, the High

Court in Shah Alam ordered that the second caveat be removed. This information was material because the way is now open for the charge, which the bank holds, to be registered. However, the photocopy of the title deed still shows the developer to be the registered proprietor. So a transfer from the developer is required which may require the bank to exercise its powers as the borrower's attorney.

In addition to the authorities cited in the judgment of the court below and to us here, we think some help can be derived from the exposition in the *Law of Mortgage* (9th Ed) by Fisher and Lightwood at pp 595– 597. It reads as follows:

> *Effect of judgment on mortgage interest.* On the above principle, a covenant in a mortgage for payment of principal is merged in a judgment obtained on the covenant and the interest runs on the judgment at the rate of 7½%pa (see *Sewing Machines Rental Ltd v Wilson* [1975] 2 All ER 553 (CA) and note the point of there being no interest on county court judgments). If the mortgage provides for a higher rate, the right to recover the difference between the higher rate and the judgment rate depends on the form of the covenant for payment of interest and the nature of the proceedings — whether the claim is against the mortgagor personally, or is against the mortgaged property.
>
> If the effect of the covenant for payment of interest is to be payable so long as any principal money shall be due on the covenant for payment of principal, then it is extinguished in the judgment together with latter covenant. On judgment being obtained, no principal is any longer due on the covenant since it is gone. The principal is thenceforth due on the judgment. The interest covenant is considered to have this effect where it provides for payment of interest until the principal is repaid, or so long as the principal or any part thereof remains unpaid.
>
> A covenant of this nature is said to be ancillary to the main covenant, and the excess of interest cannot be recovered in proceedings against the mortgagor personally. Where the interest covenant is not merely ancillary but is an independent covenant, it is not extinguished in the judgment, and the excess of interest can be recovered in personal proceedings. A covenant for payment of interest so long as any principal remains due on the security is an independent covenant, since the principal is equally due on the security whether it is owing on the covenant or the judgment. Consequently, under a covenant in this form, the excess interest can be recovered in personal proceedings (*Popple v Sylvester* (1882) 22 Ch D 98. For a form of independent covenant, see p 680 in the Appendix, infra. Such provision is implied in a registered charge: see Land Registration Rules 1925, 5.76).
>
> But in proceedings in which the mortgagee's claim is against the property, the full interest recovered by the mortgage is recoverable whether the interest covenant is independent or ancillary.

It is necessary when looking at all the English authorities to keep in the forefront of our minds that there is a big difference between English mortgages where the legal estate passes to the mortgagee and charges under the National Land Code 1965 where the legal estate remains in the borrower. The term 'security' must mean the instrument upon which the lender relies to enforce his claim. Thus, the loan agreement would be a

security. The memorandum of charge executed by the borrower is another security.

Notwithstanding an obviously erroneous reference to 'the said charge' in para 8 of the statement of claim, the bank's action in the sessions court was on the loan agreement alone, and therefore against the borrower personally. The personal covenant for payment of principal and interest arising from the loan agreement was extinguished by the judgment.

The bankruptcy notice was predicated solely upon the judgment. We therefore think that the trial judge could and should have treated the matter before him as one that concerned the validity of the bankruptcy notice only and could have directed it be set aside upon payment of the sum stipulated therein.

To that extent, we allowed this appeal because the consequence of non-payment was that the bank would have been entitled to present a bankruptcy petition.

Our allowing this appeal should *not* be understood to mean that the bank is under any obligation to return the title until the parallel obligation to satisfy the charge has been fulfilled by the borrower. One of the complications in this case was that in 1986 and 1987 and up to the point when judgment was taken, the borrower who had executed the charge failed to forward to the bank the memorandum of transfer from the developer to the borrower. The full circumstances of this aspect of the matter cries out for an inquiry because the unilateral attempts of the borrower to bypass the bank by purporting to assign his rights to his sister, Chuah Chok Kiang, through Tan Ah Tong, taken together with their then solicitor's contention that the transfer could not be traced is suggestive of sharp practice. On the material presented to us in the appeal record, it appears that this land is still registered in the name of the developer (see appeal record p 75).

This case has some similarity with *Sim Lim Finance Ltd v Pelandok Enterprise Pte Ltd & Anor* [1981] 1 MLJ 280. This is a Singapore decision. The plaintiff sued under the mortgage which provided for interest at 18%. The Court Rules only permitted 8%. The registrar refused to grant more than 8%. On appeal, Wee Chong Jin CJ held that the plaintiff could not get more than 8% on the judgment, but were entitled to retain their security until they were paid the principal sum plus interest at 18%.

The defendant was not represented in that case. The question as to whether if Sim Lim Finance collected the full amount of the judgment debt, it was still entitled to bring foreclosure proceedings to enforce recovery of the balance of the debt calculated at 18% was not answered.

Likewise, in our case, the bank's rights to register the charge now that Chuah Chok Kiang's caveat has been removed has not been tested. In such circumstances, it would be wrong for us to order the bank to return the title as prayed for by the borrower. His hands are very soiled, and specific relief is very much a discretionary remedy.

A The borrower's new solicitors may be forgiven for going for a declaration in so far as it affected the bankruptcy notice, since the borrower's tender was conditional. The trial judge did not deal with this aspect. In our judgment, an act of bankruptcy was committed but that is now of academic interest in view of the time lapse. If the borrower wants to discharge the B judgment now, he must pay principal and judgment interest up to date of realization. How the bank should go about enforcing the charge will have to await the determination of further facts.

This situation has been brought about by permitting this matter to continue in the court below as an originating summons when crucial issues of fact were contested. In so far as it concerned the bankruptcy notice, it C should have been heard in that file. In so far as the claim for the return of the title was concerned, the action should have been by writ. The hybridized application without consolidation of the pending claims in different courts has also contributed to the present *impasse*. In view of the importance of the issues involved, this case may well be a proper one for an appeal to the D Federal Court.

We may well ask ourselves:

(i) Why did the bank's solicitors not chase Lian for the transfer in 1987?

(ii) Why did the bank wait until 1992 to attack the first two caveats?

E (iii) Why did the bank wait until August 1994 to file its own caveat and issue the bankruptcy notice?

(iv) Why has the bank not taken any action against Tan Ah Tong, Chuah Chok Kiang and SF Lian for knowingly attempting to pre-empt its rights? A conspiracy, if there was one, is actionable tort.

F (v) Why did the bank's solicitors not disclose the terms of the charge in the court below?

The grey and shadowed areas of the facts in this case have compounded our difficulties in unravelling what was really going on between the parties. So far as the law is concerned, it is unfortunate that neither counsel drew our attention to RR Sethu's excellent article on merger in 'Chargee's G Rights: Real and Personal Effect of a judgment' [1988] 1 MLJ cxxvii.

Our granting costs to the borrower here and in the court below is thus a matter for real regret which fortunately is not irremediable.

Appeal allowed.

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Reported by Azra Azman-Parry

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